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No. 07-435

In The
Supreme Court of the United States

LEONARD R. FAZIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

PARRISH KRUIDENIER DUNN
BOLES GRIBBLE COOK
PARRISH GENTRY &
FISHER, L.L.P.

ALFREDO PARRISH
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
(515) 284-5737
(515) 284-1704-facsimile
Aparrish@parrishlaw.com

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether a Federal District Court Judge's familial relationship with a Government witness requires disclosure or secrecy under 28 U.S.C. § 455(a)?

Whether the Supreme Court's willingness to enforce 28 U.S.C. § 455(a) in this case may prevent substantive injustice in some future case by encouraging a judge to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered? (*See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868, 108 S. Ct. 2194, 2206, 100 L. Ed. 2d 855 (1988)).

Whether the Government's violation of a sustained motion in limine excluding prior "bad acts" evidence, twice, created prejudicial error warranting a new trial?

Whether, during sentencing, the Federal District Court can speculate as to loss amount under U.S.S.G. § 2B1.1(b)(1), when the Government does not prove that the intended victim suffered any loss?

Whether incredible testimony from one witness can provide substantial evidence to support the jury's verdicts for wire fraud?

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OPINIONS BELOW

On May 29, 2007, the Eighth Circuit Court of Appeals affirmed the judgment of the District Court for the Southern District of Iowa. *United States v. Fazio*, 487 F.3d 646 (8th Cir. 2007). App. 1. Fazio's petition for rehearing en banc was denied June 28, 2007. App. 34.

JURISDICTION

On August 3, 2006, the "JUDGMENT IN A CRIMINAL CASE" was entered by the Honorable Robert W. Pratt, Chief Judge of the United States District Court for the Southern District of Iowa. App. 23. Jurisdiction was pursuant to 18 U.S.C. § 3231.

On May 29, 2007, the Eighth Circuit Court of Appeals affirmed the judgment of the District Court for the Southern District of Iowa. *United States v. Fazio*, 487 F.3d 646 (8th Cir. 2007). App. 1. Fazio's petition for rehearing en banc was denied June 28, 2007. App. 34. Jurisdiction was pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Jurisdiction of the Supreme Court is from 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange,

alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined

not more than $1,000,000 or imprisoned not more than 30 years, or bo[illegible]

18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

18 U.S.C. § 3742(a)

(a) Appeal by a Defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or(b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

28 U.S.C. § 455(a)

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(b)

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. § 455(e)

No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States

District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

U.S.S.G. § 2B1.1

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

	Loss (Apply the Greatest)	*Increase in Level*
(A)	$5,000 or less	no increase
(B)	More than $5,000	add **2**
(C)	More than $10,000	add **4**
(D)	More than $30,000	add **6**
(E)	More than $70,000	add **8**

(F)	More than $120,000	add **10**
(G)	More than $200,000	add **12**
(H)	More than $400,000	add **14**
(I)	More than $1,000,000	add **16**
(J)	More than $2,500,000	add **18**
(K)	More than $7,000,000	add **20**
(L)	More than $20,000,000	add **22**
(M)	More than $50,000,000	add **24**
(N)	More than $100,000,000	add **26**
(O)	More than $200,000,000	add **28**
(P)	More than $400,000,000	add **30**.

STATEMENT OF THE CASE

Fazio is a self-made man. He started a shoeshine business when he was five and ended up as one of the top 40 Realtors in North America. Among his peers, he is a respected and trusted businessman in the Des Moines, Iowa community. At the time of trial Fazio was fifty-two, had three children, and owned a RE/MAX real estate franchise.

Along with selling real estate for RE/MAX, Fazio also performed foreclosure work for Homecomings Financial (Homecomings). Homecomings hired Fazio to sell foreclosed property. The work involved determining whether the property was occupied, offering the present occupants "cash-for-keys," taking pictures, tendering a broker's price opinion (BPO), doing repair work on the property, and if needed remove trash. Fazio would hire contractors or vendors to do the repair work and remove trash. Fazio would directly pay them for any work done on the properties and then send a reimbursement request to Homecomings. Fazio's employee, Allison Bice, would submit the reimbursement requests to Homecomings.

On December 15, 2004, a nine-count indictment was filed against Fazio charging mail fraud (Counts 1-6) in violation of 18 U.S.C. § 1341 and wire fraud (Counts 7-9) in violation of 18 U.S.C. § 1343. Fazio plead not guilty.

A jury trial was held in October 2005. The jury returned not guilty verdicts for Counts 1, 3, 4, 5, 6, and 7, and guilty verdicts for Counts 2 (mail fraud), 8 and 9 (wire fraud).

The evidence to support the mail fraud charges (Counts 1-6) came mainly from Bice.[1] Bice testified she created false reimbursement requests to submit to Homecomings at the request of Fazio. Fazio vehemently denied that he had any involvement in creating false reimbursement requests. His character witnesses and employees supported his credibility and honesty. Past and present employees of Fazio testified they did not see Fazio prepare inflated bills and were not asked to create inflated bills.

The jury did not find Bice credible and found Fazio not guilty of five mail fraud counts (Counts 1, 3-6) which involved her conduct. Count 2, for which the jury returned a guilty verdict, involved a fabricated $1,650 reimbursement request prepared and sent by Bice. Fazio's involvement with this Count was a fax from his home to Homecomings. Homecomings had contacted him requesting additional information regarding the request and Fazio faxed the information from his home. Fazio did not know the invoice was false. The Eighth Circuit found that it was not unreasonable for the jury to believe Bice, even though it may or may not have been the same verdict they

[1] Bice was offered immunity for her testimony.

would have rendered had they sat on the jury. *Fazio*, 487 F.3d at 655-56.

The wire fraud counts (Counts 7-9) involved a property in New Virginia, Iowa (New Virginia property). The government claimed that Fazio fraudulently, with the unknowing assistance of Candy Olson (Olson), purchased the New Virginia property from Homecomings for $48,000. Olson, with the assistance of Fazio, then sold the property to John Jordan (the trial judge's cousin) for $110,000.

Olson claimed she never authorized Fazio to purchase the New Virginia property on her behalf from Homecomings and did not authorize Fazio to sign any documents. Fazio, and six other witnesses (one being Olson's own attorney), testified she was a willing, knowledgeable and active participant. The jury found Fazio not guilty of Count 7 and guilty of Counts 8 and 9. (For a description of Counts 8 and 9, see page 27, *infra*). The Eighth Circuit found that it was not unreasonable for the jury to believe Olson, even though defense counsel "assiduously" presented evidence that impugned Olson's credibility and contradicted her assertions. *Id.* The Eighth Circuit wrote that the verdict may or may not have been the same verdict they would have rendered had they sat on the jury. *Id.*

On August 3, 2006, Fazio was sentenced to the maximum 24 months in prison, fined $40,000.00, and ordered to pay restitution of $13,115.00.

Shortly after filing his appeal, Fazio's counsel discovered that the trial judge's wife was the first cousin of Olson's buyer Jordan, who had also been a government trial witness. *Fazio*, at 652. App. 5. The trial judge did not disclose this information to the parties. *Id.* Counsel also discovered that the trial judge had commented to Jordan

during a family function, which was after the trial but prior to sentencing, that Fazio would likely receive jail time for breaking the law. *Id.*

Fazio asked the district court for a new trial and the trial judge immediately recused himself and the matter was referred to the Eighth Circuit. *Id.* Fazio requested that the Eight Circuit remand for a hearing on the recusal issue in the district court, and this was denied. *Id.* at n.2.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. A FEDERAL DISTRICT COURT JUDGE'S FAMILIAL RELATIONSHIP WITH A GOVERNMENT WITNESS REQUIRED DISCLOSURE, NOT SECRECY UNDER 28 U.S.C. § 455(a).

Fazio's counsel discovered that the trial judge's wife was the first cousin of Olson's buyer Jordan, who had also been a critical government witness. *Fazio*, 487 F.3d at 652. App. 8. Counsel also discovered that the trial judge had commented to Jordan, after trial but prior to sentencing, that Fazio would likely receive jail time for breaking the law. *Id.*

Jordan was a material trial witness for the government. Jordan's purchase of the New Virginia property from Olson was an integral fact to support the government's claim that Fazio acted with the intent to defraud Homecomings as charged in Counts 8 and 9 of the indictment. Homecomings accepted Olson's offer to buy the property for $48,000, then shortly after Homecomings accepted this offer, but before closing, Fazio marketed the property and secured an offer from Jordan to buy the

property for $110,000. *Fazio*, 487 F.3d at 651. App. 3. The government's argument was that Jordan should have purchased the property from Homecomings for $110,000, not Olson.

Not once during the entire criminal proceeding did the trial judge inform the parties that Jordan was the first cousin of his wife. Not even when Jordan testified at trial. This was inexcusable. *See Liljeberg,* 486 U.S. at 858, 866-67, 108 S. Ct. at 2201, 2206 (remarkable – and quite inexcusable – that the judge failed to disclose and recuse himself when he acquired actual knowledge of his interest in proceeding).

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

The very purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. *Liljeberg*, 486 U.S. at 865, 108 S. Ct. at 2205. Scienter is not an element of a violation of section 455(a). *Id.*, 486 U.S. at 859, 108 S. Ct. at 2202. The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that "his impartiality might reasonably be questioned" by other persons. *Id.*

Section 455(a) covers both "interest or relationship" and "bias or prejudice" grounds, and must be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance. *Liteky v. United*

States, 510 U.S. 540, 548, 114 S. Ct. 1147, 1153-54, 127 L. Ed. 2d 474 (1994). Recusal is required whenever "impartiality might reasonably be questioned." *Id.* Under section 455(a), recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge. *Liljeberg,* 486 U.S. at 860-61, 108 S. Ct. at 2203.

The test for disqualification or recusal is an objective one and asks whether, from the perspective of "the average person on the street," a reasonable man knowing all of the circumstances "would harbor doubts about the judge's impartiality." *Tyler v. Purkett*, 413 F.3d 696, 704 (8th Cir. 2005) (citation omitted). Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980), *cert. denied*, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed. 2d 22 (1980). Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. *Id.*

Jordan's status as first cousin to the judge raised reasonable questions regarding the judge's impartiality and warranted disclosure and inquiry. *See Liljeberg,* 486 U.S. at 858, 866-67, 108 S. Ct. at 2201, 2206 (remarkable – and quite inexcusable – that the judge failed to disclose and recuse himself when he acquired actual knowledge of his interest in proceeding); *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988) (trial judge recused where first cousin

with a close relationship to the judge had been an important participant in key transactions forming the basis of an indictment, more importantly, that relative communicated to the judge, substantially though maybe not extensively or in great detail, material facts and her opinions and attitudes regarding those facts); and, *Njie v. Lubbock County, Tex.*, 999 F.Supp. 858, 862 (N.D. Tex. 1998) (a judge has an affirmative duty to identify the existence of grounds for recusal without first waiting for a filed motion).

In this case, a reasonable person with knowledge of the familial relationship between the trial judge and Jordan might very well question the judge's impartiality in a trial involving Jordan as critical government witness who spent $110,000 for the New Virginia property. *See Potashnick v. Port City Constr. Co.*, 609 F.2d at 1111 (a reasonable person with knowledge of the business investments of Judge Hand and Paul Brock and the legal representation of the judge by Brock might very well question the judge's impartiality in a trial involving Paul Brock as chief counsel for a litigant).

At the bare minimum, the trial judge should have erred on the side of caution and disclosed to the parties his relationship with Jordan so the parties could deal with the issue before trial under the guidance of 28 U.S.C. § 455(e), which provides:

> No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455(e).

Immediate disclosure is consistent with the judicial-disqualification statute. The statute requires a judge to exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case. *Potashnick v. Port City Constr. Co.*, 609 F.2d at 1112. The use of "might reasonably be questioned" in section 455(a) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case. *Id.*

In this case, the trial judge's failure to bring this relationship to the attention of counsel raises questions regarding his discretion. Looking to the harshness of Fazio's sentence (maximum Guideline sentence and fine), one could reasonably conclude that the judge was angry with Fazio for selling the judge's cousin (a potential victim) the New Virginia property for $110,000, shortly after Olson had purchased the property for $48,000.

The judge was vexed with Fazio based on allegations from a court security officer that Fazio may have held a door open for a juror(s) following voir dire. During sentencing, the court ruled against Fazio on almost every contested sentencing issue, imposed the maximum Guideline sentence (24 months), and fined Fazio $40,000. Also, over objection, the court permitted the alleged victim's (Candy Olson) statement. As a "victim," Olson was allowed to profit from her sale of the New Virginia property and allowed to spend $34,000. *Fazio*, 487 F.3d at 651. App. 4.

Based on the timing of the comments the judge made to Jordan regarding jail time, the judge had already made up his mind regarding the merits of Fazio's pending motions for judgment of acquittal and new trial. The judge had not ruled on these pending motions when the "jail time"

comment was made. The judge could not have concluded Fazio would get jail time in November 2005, and then order a judgment of acquittal or new trial on Fazio's outstanding motions in March 2006.

Additionally, the judge predetermined Fazio's sentence prior to the completion of the Presentence Investigation Report (first draft prepared January 18, 2006) and prior to sentencing on August 3, 2006. The judge could not have stated Fazio would get jail time in November 2005, and then make findings under the Guidelines that would have warranted probation at sentencing in March 2006.

A reasonable person would harbor doubts about the judge's impartiality regarding at least six discretionary rulings he was required to make, all occurring *after* his conversation with his cousin and before disclosure of the relationship. These rulings were important to Fazio's innocence and sentencing findings.

While these rulings were made during the criminal proceeding, this does not preclude a challenge to the judge's partiality:

> . . . [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they

> reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky, 510 U.S. at 555, 114 S. Ct. at 1157.

The following discretionary rulings were made by the judge *after* his conversation with his cousin and before discovery of the relationship.

The first ruling was the judge's *March 7, 2006* ruling on Fazio's motion for judgment of acquittal. In this ruling the judge was required to review the evidence and make a determination whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 207, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979). The judge, when analyzing the evidence, determined that it did and indirectly found the government witnesses credible and Fazio not credible. The Eighth Circuit while respecting the jury's verdict noted the government witnesses' credibility problems and noted the inconsistencies. *Fazio*, 487 F.3d at 650-51, 655-56. App. 3-4, 12-13.

The second is the judge's *March 7, 2006* ruling on Fazio's motion for new trial. The judge determined that the government witnesses were credible and Fazio was not, thus denied the request for new trial. In this case the Eighth Circuit found, "There was evidence to support the verdict. It may or may not have been the same verdict we would have rendered had we sat on the jury. However, what the district court, or appellate court, thinks of a defendant's guilt or innocence is of little import if there is sufficient evidence to support the jury's guilty verdict." *Fazio*, 487 F.3d at 656. App. 13.

Third, on *August 3, 2006*, the judge ruled that Homecomings suffered a loss of $58,150. Fazio objected to the amount of loss and the judge ruled against him, adopting, to a large extent, the presentence investigation report. The judge determined that Fazio's base offense level was 7 (U.S.S.G. § 2B1.1(a)) and the loss amount to Homecomings was $58,150 (U.S.S.G. § 2B1.1(b)(1)(D)) which added another 6 levels for a total offense level of 13.

Fourth, on *August 3, 2006*, the judge ruled that Fazio abused a position of trust to Homecomings and awarded a two-level adjustment pursuant to U.S.S.G. § 3B1.3. Fazio objected and the judge overruled the objection.

Fifth, on *August 3, 2006*, the judge ordered the maximum Guideline sentence of 24 months and the maximum Guideline fine of $40,000. Fazio had no criminal history.

And sixth, on *August 3, 2006*, the judge determined that Fazio owed $13,115 in restitution to Homecomings. The Eighth Circuit disagreed and vacated the restitution award. *Fazio*, 487 F.3d at 660. App. 22.

Fazio requests that he be afforded the same process given other parties when raising concerns regarding a judge's impartiality. These parties were given due process, a chance to be heard, and a chance to develop the record. *See Liljeberg,* 486 U.S. at 851, 108 S. Ct. at 2198 (The Court of Appeals determined that resolution of the motion required factual findings concerning the extent and timing of Judge Collins' knowledge of Loyola's interest in the declaratory relief litigation. Accordingly, the panel reversed and remanded the matter to a different judge for such findings.); *United States v. Ruff*, 472 F.3d 1044, 1046-1047 (8th Cir. 2007) (Eighth Circuit concluded that "an average observer informed of the facts and of Baumann's

lack of involvement in this case could not reasonably question the judge's impartiality"); *United States v. Martinez*, 446 F.3d 878, 883 (8th Cir. 2006) (stating "[a]n average observer who was informed of all the facts of Martinez's case, including that Baumann was screened from the case and performed only ministerial duties at the hearing, would not reasonably question the judge's impartiality"); and, *Moran v. Clarke*, 309 F.3d 516, 517 (8th Cir. 2002) (stating that "[o]n remand, the district court did as we requested, denied the recusal motion, but nevertheless recused"). Unfortunately, Fazio cannot provide the Supreme Court with an explicit record to review. His request for remand to develop the record was denied. *Fazio*, 487 F.3d at 652, n.2. App. 5.

The trial judge's failure to disclose his relationship with Jordan, and the "jail time" comment, clearly raises doubts as to the purity of the judge's post-trial and sentencing rulings. The harshness of Fazio's sentence leads a reasonable person to conclude that the judge was outraged with Fazio for selling the judge's cousin (a potential victim) the New Virginia property for $110,000, after Candy Olson had recently purchased the property for $48,000.

Fazio should be granted a new trial because the trial judge's cousin was a critical government witness and the judge did not disclose this fact, and the judge made a comment to his cousin that Fazio would get "jail time" before the ruling on post-trial motions and before sentencing. These facts seriously affect the fairness, integrity, and public reputation of the judicial proceedings. The judge's recusal following sentencing did nothing to cure the appearance of a bias or prejudice against Fazio, all the judge's rulings had been completed by this time.

In the alternative, the judge's failure to inform counsel that his first cousin was a witness and the conversation regarding Fazio's "jail time" warrant further review in the district court.

Providing Fazio relief in this case and granting him a new trial will prevent such an injustice in future cases. This type of relief was recognized by the Supreme Court in *Liljeberg, supra*:

> These facts create precisely the kind of appearance of impropriety that § 455(a) was intended to prevent. The violation is neither insubstantial nor excusable. Although Judge Collins did not know of his fiduciary interest in the litigation, he certainly should have known. In fact, his failure to stay informed of this fiduciary interest may well constitute a separate violation of § 455. See § 455(c). Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered. It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment.

Liljeberg, 486 U.S. at 867-868, 108 S. Ct. at 2206-2207.

II. THERE WAS PREJUDICIAL ERROR WHEN THE JURY HEARD EVIDENCE OF PRIOR BAD ACTS.

On appeal Fazio argued there was prejudicial error when the jury heard evidence of other bad acts, specifically, that he had submitted inflated claims for repayment outside of the times alleged in the indictment and that he committed an ethical violation. *Fazio*, 487 F.3d at 656.

What makes this evidentiary error so egregious is that defense counsel filed the necessary motion in limine prior to trial to prevent this evidence from reaching the jury and the district court had sustained the motion. *Id.* What is the point of defense counsel filing a motion in limine and having it sustained by the district court, if the government is going to ignore it?

Prior to trial Fazio filed a motion in limine requesting that the following evidence be excluded from trial: (1) Any evidence regarding real estate transactions prior to January 20, 2002, or after November 20, 2003, involving any acts that could be considered improper, illegal and/or unethical; and (2) any evidence of ethical violations on the part of the accused as they are not part of any criminal violations. The government responded that it would not delve into such matters. The district court sustained the motion. *Id.*

During Allison Bice's direct examination, she testified contrary to the court's ruling and stated that Fazio made her alter foreclosure reimbursements commencing in 2001. This testimony related to a time frame outside the period stated in the indictment. The indictment was from January 28, 2002 through November 20, 2003.

Diana Pastor, who was a real-estate agent for Fazio, testified that she ran one advertisement for the New Virginia property. Pastor testified, contrary to the court's ruling, that after she ran the ad, she contacted Fazio to tell him it was a violation to run the ad listing property before the property closed by the prior owner. This improper testimony was on a collateral matter and not relevant to whether Fazio intended to defraud Homecomings.

These violations occurred during the testimony of two crucial government witnesses (Bice and Pastor) who the Eighth Circuit recognized had credibility issues and provided inconsistent statements. *Id.* at 655-56.

The testimony from Bice and Pastor should have never reached the jury. Prior to trial Fazio took the necessary steps to ensure that he would not be surprised by this type of evidence and it still happened. Curative instructions did not cure the prejudice.

The testimony from Bice and Pastor unfairly prejudiced the verdicts and attempted to prove that Fazio was a dishonest person. The testimony was excludable under Federal Rule of Evidence 403 and 404(b). The district court had already sustained the request to keep out the evidence. *Fazio*, 487 F.3d at 656.

The evidence was prejudicial because the alleged conduct was not similar in kind to the crimes charge. Evidence of uncharged conduct can be admissible if such evidence is "intrinsic evidence" which is inextricably intertwined as "an integral part of the immediate context of the crime charged." *United States v. Rolett*, 151 F.3d 787, 791 (8th Cir. 1998) (citations omitted). The conduct described by Bice was outside the period stated in the

indictment. The conduct described by Pastor was not illegal and not an integral part of whether Fazio possessed the intent to defraud Homecomings.

The evidence was excludable under Federal Rule of Evidence 404(b). Rule 404(b) excludes evidence of specific bad acts used to circumstantially prove a person has a propensity to commit acts of that sort because of the likelihood the jury may misuse it. *United States v. Johnson*, 439 F.3d 884, 887 (8th Cir. 2006). In Fazio's case, this is what the testimony from Bice and Pastor accomplished: the testimony circumstantially proved that Fazio, at some unknown time regarding unknown properties, made statements regarding over billing on properties and committed ethical violations. Both of which Fazio denied.

The evidence should have not reached the jury because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Fed. R. Evid. 403.

The jury acquitted Fazio of Counts 1, 3, 4, 5, and 6 which supported Fazio's testimony that Bice was solely responsible for submitting false reimbursements to Homecomings without his direction. With regard to Count 2, the jury must have found that when Fazio faxed an invoice to Homecomings for reimbursement this was sufficient to find him guilty. The propensity testimony from Bice persuaded the jury to convict Fazio of this count.

Additionally, the testimony prejudiced Counts 8 and 9 because the jury could use the propensity testimony to infer that Fazio was practicing the same type of alleged deceit regarding the acquisition of the New Virginia property for Olson and subsequent sale to Jordan.

Fazio was unfairly prejudiced by the testimony from Bice and Pastor and he should be granted a new trial.

III. HOMECOMINGS SUFFERED NO LOSS UNDER U.S.S.G. § 2B1.1(b)(1).

The district court determined that Fazio's base offense level was 7 (U.S.S.G. § 2B1.1(a)) and the loss amount to Homecomings was $58,150 (U.S.S.G. § 2B1.1(b)(1)(D)) which added another 6 levels for a total offense level of 13.[2] The Eighth Circuit determined that the loss amount was $33,150, but this did not change the total offense level. *Fazio*, 487 F.3d at 658-59. App. 17-19.

Homecomings suffered no loss. The loss determination was based on the unproven assumption that Homecomings' sale of the New Virginia property to Olson for $48,000 should have never happened: What should have happened is that Homecomings should have sold the New Virginia property, in its rehabilitated state, to Jordan for $110,000. The government provided no proof that this was even a possibility. The district court and Eighth Circuit erred when finding that Homecomings suffered a loss.

The government in its closing argument questioned whether Homecomings suffered a loss:

> *The Government doesn't have to prove the precise nature of the fraud, doesn't have to prove that Homecomings actually got defrauded out of any*

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[2] The court started with the loss amount of $62,000 ($110,000 – $48,000). The court credited $3,500 for improvements and $2,000 for a payment to Jordan thus equaling a final loss amount of $56,500 for the New Virginia property. The court then added another $1,650 for Count 2.

> *money. Take a look at those instructions if you have any trouble. It doesn't have to prove that only wires were used to commit fraud.*

(Closing Arguments tr. 9).

The loss amount for sentencing purposes is the greater of the actual or intended loss. U.S.S.G. § 2B1.1 comment. (n.3(A)). Intended loss is "the loss the defendant intended to cause to the victim." *United States v. Staples,* 410 F.3d 484, 490 (8th Cir. 2004) (citation omitted). The government must prove the intended loss by a preponderance of the evidence. *Id.* The court need only make a reasonable estimate of the loss. U.S.S.G. § 2B1.1, comment. (n.3(C)).

For the following reasons Homecomings did not suffer a loss and Fazio did not intend to cause a loss to Homecomings.

(i) Homecomings set the selling price for the New Virginia property.

Many checks and balances were utilized by Homecomings to make sure they arrived at a fair market value for the New Virginia property. For the New Virginia property, Homecomings set the price ($59,900) after its valuations group looked at pictures of the property, reviewed the interior measurements, reviewed the comparable properties in the area, reviewed the BPO, and had a full appraisal completed by an independent appraiser. Once the valuations group arrived at a value conclusion, an asset manger reviewed the value and agreed or disagreed with it. The asset manager would determine whether to sell the property "as is" or "rehab" the property. All this was required before Homecomings sent the listing agreement

to Fazio. The asset manager determined that it was best to list the property in its "as is" condition for $59,900.

There was no testimony that the final sales price of $48,000.00, or the offers leading up to that figure, were fraudulent, false, or unfair. Fazio provided accurate information in his BPO in order for Homecomings to set the price for selling the property. The jury affirmed this by finding him not guilty of Count 7.

Homecomings rejected many offers, counter-offered a few times, and ultimately determined that it would sell the property for $48,000. Homecomings made a reasonable business decision to sell the property to Olson for $48,000 based on accurate information. It was up to Homecomings, and Homecomings alone, to accept or reject reasonable offers on the New Virginia property.

It is unlikely that Jordan would have come in and offered Homecomings $110,000 for the New Virginia property, after Homecomings had already set their maximum selling price of $59,900, and had agreed to sell the property to Olson for $48,000.

(ii) Fazio received no benefit from the Olson to Jordan sale.

Following closing (that Fazio was not at), Olson walked out the door with $91,025.74. Olson spent $34,000 on her own personal needs. The record is clear that Fazio in no way profited from the New Virginia transaction. *Fazio*, 487 F.3d at 658. App. 18. He is still paying on the original $45,000 note from Polk County Bank. *Id.*

(iii) Fazio did not cause a loss amount of $1,650 to Homecomings because of a false billing.

Bice generated the false paperwork and invoice, not Fazio. Fazio did not know that Bice had fabricated the invoice until after she left his office.

(iv) When determining the amount of loss the district court and the Eighth Circuit failed to take into consideration how fast the New Virginia property was sold from Homecomings to Olson against the marketing expense and exposure time for the property if a buyer was not found immediately.

On August 4, 2003, by fax, Fazio received the listing agreement from Homecomings to sell the property for $59,900. During August, Fazio and Olson made offers on the property and Homecomings and Olson settled on a sales price of $48,000. Homecomings had the paperwork signed September 16, 2003.

Both the Iowa Appraisal and Homecomings' appraisal estimated a much longer marketing and exposure time. The Iowa Appraisal estimated that it could take up to 12 months to sell the property. Homecomings' appraisal estimated a marketing time of 60-90 days and an exposure time of 180 days. The quick sale of the property to Olson saved Homecomings the expense and time of potentially carrying the property for 12 months. The Eighth Circuit rejected this argument, finding it too speculative. *Fazio*, 487 F.3d at 658-59. App. 19.

For all the above-stated reasons Homecomings suffered no loss and there should have been no adjustment under U.S.S.G. § 2B1.1(b)(1). The finding of no loss would also affect the fine under U.S.S.G. § 5E1.2(c).

IV. FAZIO IS INNOCENT OF WIRE FRAUD.

Count 8 of the Indictment alleged wire fraud in violation of 18 U.S.C. § 1343. The "Date of Transmission" was August 20, 2003. The "Wire Transmission" was a wire communication (by facsimile) from Fazio to Homecomings Financial in which Fazio conveys an offer to purchase property identified as 1048 315th Street, New Virginia, Iowa from Candy Olson in the amount of $48,000.00.

Count 9 of the Indictment also alleged wire fraud in violation of 18 U.S.C. § 1343. The "Date of Transmission" was November 20, 2003. The "Wire Transmission" was a wire communication (wire transfer) from Central Iowa Escrow, dba Russell Closings, Inc. of funds in the amount of $41,267.79 representing net funds at closing of sale to Olson remitted to Homecomings Financial.

The essential elements of wire fraud are a scheme to defraud, the use of interstate wires incident to the scheme, and intent to cause harm. 18 U.S.C. § 1343.

Regarding the sufficiency of the evidence claim for wire fraud the Eighth Circuit determined that in order "to convict Fazio of these charges, the jury had to find that Olson was an unwilling participant in the transaction. The jury was entitled to believe the testimony of Olson in this regard, and it apparently did so. We cannot say that this was unreasonable." *Fazio*, 487 F.3d at 658. App. 12-13.

It was unreasonable for the jury to believe the implausible testimony of Olson and the Supreme Court should step in and dismiss the convictions, or at least grant a new trial. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985) (documents or objective evidence may contradict the witness's story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it); *United States v. Garcia*, 978 F.2d 746, 748 (1st Cir. 1992) (stating that although "[i]t is axiomatic that, absent exceptional circumstances, issues of witness credibility are to be decided by the jury. . . . [there is] an extremely narrow exception to this general rule: Where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror, a court may grant a new trial"); *Haakinson v. United States*, 238 F.2d 775, 779 (8th Cir. 1956) (suggesting a jury is free to accept a witness's testimony as long as it is not "incredible or unsubstantial on its face").

Olson testified she did not authorize Fazio to purchase the New Virginia property on her behalf from Homecomings. However, Fazio, and six other witnesses (one being Olson's own attorney), testified she was a willing, knowledgeable and active participant. The Eighth Circuit recognized this evidence. *Fazio*, 487 F.3d at 651, 655. App. 3-4, 12.

Two of the witnesses (Bice and Dyar) who contradicted Olson were relied on by the Eighth Circuit to support the jury's findings regarding mail fraud. *Fazio*, 487 F.3d at 655. App. 12. Why should the testimony of Bice and Dyar be credited to support guilt for mail fraud and then be discarded to support innocence for wire fraud? This is neither fair nor just.

Additionally, the same arguments apply to granting Fazio a new trial under Federal Rule of Criminal Procedure 33(a). What a miscarriage of justice to allow one witness's (Olson) testimony to be given more weight than seven other witnesses who contradict her testimony. The Eighth Circuit even recognized the problems with the testimony of the witnesses when it wrote, "[i]t may or may not have been the same verdict we would have rendered had we sat on the jury." *Fazio*, 487 F.3d at 656. App. 13.

The wire fraud counts should be dismissed, or in the alternative, a new trial granted.

CONCLUSION

For the above-stated reasons, Fazio respectfully requests the Supreme Court grant a petition for a writ of certiorari on the three issues set out above.

Respectfully submitted,

PARRISH KRUIDENIER DUNN
BOLES GRIBBLE COOK
PARRISH GENTRY &
FISHER, L.L.P.

ALFREDO PARRISH
2910 Grand Avenue
Des Moines, Iowa 50312
(515) 284-5737
Fax (515) 284-1704
aparrish@parrishlaw.com

487 F.3d 646

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Appellee,

v.

Leonard R. **FAZIO**, Appellant.
No. 06-3028.

Submitted: Jan. 10, 2007.
Filed: May 29, 2007.
Rehearing and Rehearing En Banc Denied June 28, 2007.*

Alfredo Parrish, argued, Des Moines, IA, for appellant.

William C. Purdy, Asst. U.S. Atty., argued, Des Moines, IA, for appellee.

Before WOLLMAN, BEAM, and MELLOY, Circuit Judges.

BEAM, Circuit Judge.

Leonard **Fazio** appeals his conviction and sentence for one count of mail fraud and two counts of wire fraud. 18 U.S.C. §§ 1341, 1343. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Fazio is a licensed real estate broker with his own RE/MAX franchise in Des Moines, Iowa. In this capacity, **Fazio** also attended to third-party properties for out-of-state mortgage companies, concerning himself with foreclosures, relocations and repossessions. The mortgage companies directed him to check on property occupancy, to

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* Judge *Colloton* did not participate in the consideration or decision of this matter.

get possession of properties with "cash-for-keys" deals, and to provide the selling mortgage company an opinion on the estimated value of a particular property. Homecomings Financial was one of the companies that hired **Fazio** to perform such third-party work. Homecomings would either enlist **Fazio** to sell the third-party property "as is," or would direct **Fazio** to rehabilitate the property by hiring a contractor to do painting and repairs. If rehabilitation was necessary, **Fazio** would hire and pay the contractors, and submit reimbursement requests to Homecomings.

Fazio submitted several such requests for reimbursement to Homecomings, which requests provide the basis for the mail fraud charges. According to **Fazio's** employees (who were government witnesses), **Fazio** directed them to fabricate or inflate bills for reimbursement. Allison Bice, **Fazio's** office manager from 2001 through 2004, testified that **Fazio** directed her to inflate bills, and to "get as much money out of Homecomings as . . . possibl[e]." Bice testified that **Fazio** felt the third-party property business was not terribly profitable, and this was a way to recoup losses. Heather Dyar, who worked as a bookkeeper in the office, testified that when she noticed that Bice's invoices were inflated, she expressed concern to **Fazio** that a crime was being committed. **Fazio** brushed her off. He told her that no one could tell him what to charge for his services, and that this was not an uncommon practice in the third-party property market. Diana Pastor, one of **Fazio's** real estate agents, testified that **Fazio** had told Bice to bill Homecomings the "maximum" amount – meaning the highest amount that Homecomings would pay for a particular service, based on a list supplied to the local agents. **Fazio** does not contest that Homecomings was billed excess amounts, and in some

cases for work not performed by contractors. However, **Fazio** contends that he did not know that Bice was submitting inflated bills and that he did not direct her to do so.

The wire fraud charges stem from **Fazio's** handling of the listing for a Homecomings' acreage in New Virginia, Iowa. Homecomings retained **Fazio** to do a broker price opinion on the property, and he opined that the property was worth $40,000 "as is" or $80,000 if rehabilitated. Homecomings opted to sell it without rehabilitation, and directed **Fazio** to list it for $59,900. **Fazio** attempted several times to buy it for himself, but each offer was summarily rejected by Homecomings. **Fazio** directed Dyar, who was assisting him with the electronic offer submissions, to call Homecomings and ask why the offers were being rejected. A Homecomings representative told Dyar that it was company policy not to sell to listing agents. Dyar testified that upon hearing this news, **Fazio** directed her to submit offers to Homecomings in Candy Olson's name. Olson was **Fazio's** girlfriend at the time. Homecomings accepted "Olson's" offer to buy the property for $48,000. Shortly after Homecomings accepted this offer, but before closing, **Fazio** marketed the property and secured an offer from John Jordan to buy the property for $110,000. The sale required some repair work to be performed, including trash removal, roof repairs, new carpeting, painting and drywall work.

Olson testified that she did not know that **Fazio** had submitted an offer in her name. She testified that he told her that she signed papers with regard to the offer when she was in the hospital recovering from brain surgery, but she did not remember doing so. Other witnesses testified that Olson knew all along that **Fazio** was buying the

property in her name, and that she hoped to profit from it. And in fact, she did profit. **Fazio** secured a loan through his realty company's line of credit for approximately $45,000 for Olson's November purchase of the New Virginia real estate. **Fazio** intended to pay off the loan and realize a substantial profit from the Jordan transaction. Olson testified that he offered to pay her $2,000 for letting him use her as a conduit.

Unfortunately for **Fazio**, his relationship with Olson soured in the midst of these various transactions. Olson attended the closing on the New Virginia property alone and has never turned over the proceeds of the transaction to **Fazio**. Her personal attorney testified that she kept $31,000 of the proceeds for herself and gave him the remainder to keep in his trust account. The attorney testified that he made a few disbursements from the account for bills which needed to be paid (including Olson's tax obligations as a result of the transaction, and $2,000 in reimbursements to Jordan for deficiencies in the property). The attorney testified that he wrote a check to the United States Marshal's office for the remaining balance in the account.

A jury convicted **Fazio** of two counts of wire fraud in connection with the sale of the New Virginia land, and one count of mail fraud for an inflated reimbursement request. Specifically, the jury found that **Fazio** submitted by mail a fraudulent request for reimbursement for $1,650 for work done by a contractor to remove trash from a property in Des Moines. The two counts of wire fraud related to the offer **Fazio** faxed, purportedly on Olson's behalf, and the money wired to Homecomings at closing, also allegedly on Olson's behalf.

After disposal of post-trial motions, including a motion for new trial, the district court sentenced **Fazio** to twenty-four months' imprisonment, imposed a $40,000 fine, and ordered $58,150[1] in restitution to Homecomings. **Fazio** appealed. Shortly thereafter, **Fazio's** counsel discovered that the trial judge's wife was the first cousin of Olson's buyer Jordan, who had also been a government trial witness. Counsel also discovered that the trial judge had commented to Jordan, after trial but prior to sentencing, that **Fazio** would likely receive jail time for breaking the law.

Using this "newly discovered evidence," **Fazio** asked the district court, a second time, for a new trial. The trial judge immediately recused himself and the matter was referred to this court.[2]

On appeal, **Fazio** contends that he is entitled to a new trial because of the trial court-witness relationship or, at least, because the trial judge should have recused himself prior to pronouncing the sentence. **Fazio** additionally argues that the district court should have ordered a pre-trial evidentiary hearing on his assertion that a conflict of interest existed because his initially retained attorney was married to an assistant United States Attorney (AUSA). With regard to the trial, **Fazio** argues there was insufficient evidence to support the guilty verdicts, that there

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[1] The district court credited **Fazio** for the amount that Olson's attorney paid to the United States Marshal's office, $45,035, and ordered **Fazio** to pay the balance, $13,115. The government indicated at sentencing that the $45,035 would be remitted to Homecomings.

[2] **Fazio** requested that this court remand for a hearing on the recusal issue in the district court, which request we denied.

were evidentiary errors at trial, and that there were several errors with regard to his sentence.

II. DISCUSSION

A. Recusal

Fazio argues that the trial judge's failure to inform the parties that his wife's first cousin was a government witness seriously affected the fairness and integrity of his trial. He also asserts that at a minimum, the trial judge should have recused himself prior to sentencing because of the comment he made that **Fazio** would receive jail time for breaking the law.

It is unclear what our standard of review should be for this issue, which has two separate components: (1) the district court's implicit decision during trial not to disclose his relationship to Jordan or recuse, and (2) the district court's failure to recuse for the sentencing proceeding after making the "jail" comments to Jordan. **Fazio** seems to admit that we review the second component for plain error. We hold, however, that the first component – the district court's implicit decision not to disclose and recuse – should be reviewed for an abuse of discretion, which would be our standard had this decision been made on the record. *See* ***Moran v. Clarke***, 296 F.3d 638, 648 (8th Cir.2002) (en banc) (abuse of discretion standard for district court's decision not to recuse).

We find that the district court did not abuse its discretion in failing to recuse during **Fazio's** trial. **Fazio** concedes that the trial judge was not required by 28 U.S.C. § 455(b) to disclose that his wife was a cousin to one of the witnesses. Section 455 requires a judge to recuse himself

when a material witness is related within the third degree to the judge or his spouse. ***Id.*** § 455(b)(5). A first cousin is considered the fourth degree of relationship. However, **Fazio** argues that section 455(a) does require recusal in these circumstances. Section 455(a) provides that any judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." ***Id.*** § 455(a). **Fazio** cites our decision in ***Moran*** in support of his arguments.

In ***Moran***, one of the defendants admitted at her deposition that she and the district court judge knew each other socially for over twenty-one years, and during those years they had visited one another's homes on various occasions. Upon learning of this relationship, the plaintiff asked the district court to recuse, which request the district court denied without comment. On appeal, we noted that section 455(a) does not require scienter, or an actual bias, but instead it contains a purely objective standard. ***Moran***, 296 F.3d at 648. We reiterated that the key ingredient in a section 455(a) recusal case is avoidance of the appearance of impropriety, as judged by whether the average person on the street might question the judge's impartiality. **Id.** In light of the longtime and relatively close social relationship between a party to the proceeding and the trial judge, we remanded to the district court for a more thorough (than an order without comment) consideration of the recusal issue. ***Id.*** at 649.

Moran is not dispositive for a number of distinguishing reasons. First and foremost, the questioned relationship was between the trial judge and a *party,* not simply a witness. And despite **Fazio's** attempts to paint Jordan as a material witness for the government, an examination of the record belies this assertion. Jordan's testimony was

actually more favorable to **Fazio** than the government. He testified that he bought the New Virginia property for its listed price of $110,000, that he was quite happy with the property, and that it was his understanding that the property was an investment for both Olson and **Fazio**. The key issue in the fraud counts relating to the New Virginia property was whether Olson was a willing participant in the transaction. Jordan's testimony helped **Fazio** in that regard. Jordan also testified that he was a longtime friend of **Fazio's**. His testimony, including cross-examination and redirect examination consisted of twenty-six pages within a voluminous transcript. Jordan's relationship to the **Fazio** trial is much less significant than the ***Moran*** party was to that proceeding.

Moran is also distinguishable because the record suggested a "fractious relationship between the district court and Moran's attorneys." ***Id.*** at 649. A careful review of the record suggests no such conflict in **Fazio's** trial proceedings. We admit that the trial court's handling of this matter was wanting. Ideally, once the trial judge realized that one of the witnesses was his wife's cousin, he should have disclosed the possible conflict to the parties. *See* ***Id.*** ("We find particularly worrisome the district court's failure to disclose this conflict himself, as permitted by section 455(e)."). In the district court's defense, it is quite possible that he was unaware of the issue until after trial started. Nonetheless, disclosure would have been preferable, regardless of whether doing so during trial would have been cumbersome. However, we cannot say that the trial judge's failure to do so was an abuse of discretion.

Fazio also complains that the pre-sentence comments the trial judge made to Jordan require that he be disqualified from the sentencing of **Fazio**. As noted above, we

review this issue for plain error. Before an appellate court can correct an error not raised at trial, it must find that there was plain error that affected substantial rights. Even then, an appellate court may exercise its discretion to notice the error only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. ***United States v. Pirani***, 406 F.3d 543, 550 (8th Cir.), *cert. denied*,___ U.S. ___, 126 S.Ct. 266, 163 L.Ed.2d 239 (2005). The judge, in response to Jordan's inquiry, told Jordan that **Fazio** would get jail time because he broke the law. We find no error in the district court's failure to recuse for sentencing. Instead, we find that this comment, from an experienced federal trial judge, merely reflected the reality of the situation in light of the federal Sentencing Guidelines. *See, e.g.*, ***United States v. Ture***, 450 F.3d 352, 357 (8th Cir.2006) (reversing district court's decision to give only probation when the Guidelines called for at least twelve months of incarceration); ***United States v. Givens***, 443 F.3d 642, 645-46 (8th Cir.2006) (rejecting the district court's sentence of "time served" when defendant had served no time and a Guidelines range of twenty-four to thirty months applied).

In addition to the two-part recusal issue, there is one more matter we must consider before moving on to **Fazio's** remaining arguments. The recusal issue was first raised in **Fazio's** second motion for new trial, based on newly discovered evidence, filed with the district court after the notice of appeal had been filed. Of course, once the notice of appeal was filed, the district court was without jurisdiction to take any further action in the case. As a result, the motion for new trial is still pending. In light of our decision that the district court did not err by not recusing during trial or at sentencing, we find that the motion for

new trial should be denied.[3] In view of the fact that we are also remanding to the district court for reasons discussed infra, we direct the district court to deny the still-pending motion for new trial.

B. Conflict of Interest

A few months after **Fazio** was indicted, he raised an allegation regarding a potential conflict of interest through a motion to dismiss. **Fazio** argued his Sixth Amendment right to effective assistance of counsel was adversely implicated because his initially retained defense counsel was married to an AUSA who was allegedly involved in the early investigation of the criminal charges against him. The district court held a hearing on the motion to dismiss and denied it without an evidentiary hearing, finding that the allegations of conflict of interest were too speculative and that **Fazio** could point to nothing in the record indicating that **Fazio's** case was adversely affected by the relationship. The court also found that no substantive information about the case was exchanged by the AUSA and her husband defense attorney.

We review the district court's refusal to hold an evidentiary hearing on a potential conflict of interest for an abuse of discretion, ***Covey v. United States***, 377 F.3d 903, 909 (8th Cir.2004), and find none. We agree with both the government and the district court that the conflict claims were too speculative to warrant an evidentiary

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[3] We also doubt that the current offering is really "newly discovered evidence." We question whether the relationship was not something that could have been discovered prior to trial, especially considering Jordan's friendly relationship with **Fazio**.

hearing. **Fazio's** current counsel was retained within weeks after his indictment. And though the AUSA in question was the attorney who took the initial call indicating that a local real estate agent might be engaged in unlawful practices, the AUSA instructed the caller to contact the FBI. When the matter was referred from the FBI back to the United States Attorney's office, the AUSA immediately recused herself from the matter. There was no evidence that any substantive information about the case passed between **Fazio's** initial defense counsel and his AUSA spouse. Accordingly, we find no abuse of discretion and reject **Fazio's** arguments on this point.

C. Trial Errors

Fazio argues that there was insufficient evidence to support the verdict and that the verdict was contrary to the weight of the evidence. For a sufficiency challenge, we view the evidence, and all of its inferences, in the light most favorable to the verdict. ***United States v. Lee***, 451 F.3d 914, 916 (8th Cir.2006). We reverse only if no reasonable jury could find **Fazio** guilty of the charges. ***United States v. Walker***, 393 F.3d 842, 846 (8th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 463, 163 L.Ed.2d 352 (2005). While Federal Rule of Criminal Procedure 33(a) authorizes a district court to "vacate any judgment and grant a new trial if the interest of justice so requires," a motion for new trial based on the weight of the evidence is generally disfavored, and the district court's authority to grant a new trial should be exercised sparingly and with caution. ***United States v. Johnson***, 474 F.3d 1044, 1050-51 (8th Cir.2007).

Viewing the evidence in the light most favorable to the guilty verdict, we find that a reasonable jury could have convicted **Fazio** of the charged offenses. With regard to the mail fraud,[4] Bice testified that **Fazio** directed her to inflate billings. Dyar testified that she questioned **Fazio** about the problem, but that he brushed her off by essentially saying that everybody does it. Pastor also testified that **Fazio** had directed Bice to get the most money out of Homecomings as possible. **Fazio's** counsel attacked Bice's credibility during the defense case, but the jury obviously believed Bice, at least in part. It was entitled to do so, and was certainly not unreasonable in doing so.

Similarly, with regard to the wire fraud and the New Virginia property, Candy Olson testified that she did not know that **Fazio** was buying the property in her name, that she did not sign the faxed offer, and that she did not understand what was going on with this property until she closed on the property. Pastor testified that she thought the property was worth much more than **Fazio's** submitted price opinion, and that **Fazio** told her he was going to price the property low and "steal" it from Homecomings. In his defense, **Fazio** assiduously presented evidence that impugned Olson's and Pastor's credibility and contradicted their assertions. We concede that there were numerous inconsistencies between Olson's testimony and other evidence in the case. However, to convict **Fazio** of these charges, the jury had to find that Olson was an unwilling participant in the transaction. The jury was entitled to

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[4] We have also considered, and reject, **Fazio's** assertion that there was no evidence that the mail was used to transmit the documents at issue in Count 2. We agree with the government that there was sufficient evidence of use of the mail.

believe the testimony of Olson in this regard, and it apparently did so. We cannot say that this was unreasonable.

For mostly the same reasons, we do not fault the district court for refusing to exercise its limited discretion to grant Rule 33 relief. There was evidence to support the verdict. It may or may not have been the same verdict we would have rendered had we sat on the jury. However, what the district court, or appellate court, thinks of a defendant's guilt or innocence is of little import if there is sufficient evidence to support the jury's guilty verdict. The jury watched and heard each witness testify, viewed the documentary evidence, and came to a conclusion about who and what to believe. **Fazio** contends that because the jury acquitted him on some of the counts, it must have had reasonable doubt on the remaining counts. We disagree, and believe instead that the jury carefully performed its duty by not simply rendering a blanket verdict on all counts. We, too, have carefully examined the record and find no error that should have been rectified by the operation of Rule 33.

We next turn to **Fazio's** allegations of error with regard to various evidentiary rulings. We review the trial court's evidentiary rulings for an abuse of discretion. ***United States v. Edelmann***, 458 F.3d 791, 809 (8th Cir.2006) (bad act evidence); ***United States v. Chauncey***, 420 F.3d 864, 875 (8th Cir.2005) (defendant's proffered relevant evidence), *cert. denied*, 547 U.S. 1009, 126 S.Ct. 1480, 164 L.Ed.2d 258 (2006). **Fazio** argues that there was prejudicial error when the jury heard evidence of other bad acts, specifically, that he had submitted inflated claims for repayment outside of the times alleged in the indictment and that he committed an ethical violation.

Prior to trial, the district court sustained **Fazio's** counsel's motion in limine to exclude other "bad act" evidence. However, on direct examination, Bice testified about occasions wherein **Fazio** had directed her to submit inflated bills, and some of those instances were outside of the charged time frame. The district court gave a cautionary instruction immediately after Bice was finished testifying. The second incident occurred during Pastor's testimony, wherein she testified that she thought it was an ethical violation for **Fazio** to advertise the New Virginia property as his own listing before Olson had closed on the purchase of the property. Following an objection and discussion outside of the jury's presence, the district court instructed the jury to disregard Pastor's answer regarding the ethical violation.

The government argues that it did not purposefully elicit testimony in violation of the motion in limine, that the evidence was relevant to give the jury a full picture of the criminal conduct, and that any error was adequately cured by the district court's prompt instructions. We agree with the government's characterization of this evidence and find that the district court's remedy cured any possible prejudice. Bice testified that she worked for **Fazio** from February 2001 through March 2004, and that during that time period, she routinely submitted inflated bills to Homecomings. Pastor volunteered extra information when asked about whether she ran an ad for the New Virginia property. The district court took prompt remedial action with regard to both comments, and further gave the jury an "other bad acts" instruction in the final jury instructions. No abuse of discretion occurred with regard to this evidence.

Fazio's final argument with regard to trial error is that he was denied his Sixth Amendment right to testify and present a defense when the district court precluded him from testifying about the sexual orientation of a previous witness, who was also one of his former employees. **Fazio** testified on direct examination about how he came to hire this agent:

> And without sounding too egotistical, she was a terrible Realtor at Iowa Realty. A lot of it was her lifestyle. A lot of it she just didn't come across good to people. She's very smart, very educated, and the most she ever made in real estate was $16,000, and I just knew she had more potential than that.

On cross-examination, the government followed up, asking **Fazio** if this agent was unsuccessful before coming to work for him, and **Fazio** reiterated that she "wasn't doing very well" at her former job, but that she has become a productive agent with his training. On redirect, **Fazio's** counsel again began questioning him about this agent's "lifestyle issues." At this point the government objected, and after some colloquy with the trial judge, the court excluded it as irrelevant. Counsel for **Fazio** argued that the government opened the door to this line of reasoning, and that **Fazio** was trying to enhance his own credibility by pointing out that he hired her in spite of her problems.

Subject to reasonable restrictions, the Sixth Amendment does grant the accused the right to present relevant evidence in his favor. ***Chauncey***, 420 F.3d at 875. The district court found, however, that the proffered evidence was not relevant. We agree. We also find that **Fazio** did manage to testify that the agent had "lifestyle" issues, a common euphemism for referring to someone with a

homosexual orientation. And, **Fazio's** stated reason for wanting to introduce the evidence – to bolster his own credibility by showing the jury that he hired the agent because he thought she had good sales potential despite her previous low sales performance – was satisfied by his other testimony. **Fazio** clearly testified that the agent had been a low performer at Iowa Realty when he hired her. We, like the district court, fail to see the relevance of **Fazio's** opinion that the reason she had not previously been a successful agent was somehow related to her sexual orientation. This contention is without merit.

D. Sentencing

Fazio makes several arguments relating to his sentence. He first contends that the district court wrongly found facts to support the amount of loss and the abuse of trust enhancement in violation of the Sixth Amendment, the Due Process Clause, and ***United States v. Booker***, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). We have repeatedly rejected similar arguments since the Supreme Court decided *Booker,* and will do so in this instance as well. *E.g.*, ***United States v. Hines***, 472 F.3d 1038, 1040 (8th Cir.2007) (per curiam) (noting that under *Booker* and this court's post-***Booker*** precedent judicial fact-finding is permissible at sentencing so long as the district court understands that the Sentencing Guidelines are advisory). Because the district court treated the Guidelines as advisory, **Fazio's** argument fails.

Fazio next alleges that the district court's determination of total loss in the case, which impacted his Guidelines range, was incorrect. We review the district court's interpretation of loss as used in the Guidelines de novo,

and its calculation of loss for clear error. ***United States v. Craiglow***, 432 F.3d 816, 820 (8th Cir.2005). Under the clearly erroneous standard, we will affirm the trial court's decision unless it is not supported by substantial evidence, was based on an erroneous view of the law, or we are left with a firm conviction that a mistake has been made after reviewing the entire record. ***United States v. Wallraff***, 705 F.2d 980, 987 (8th Cir.1983).

The district court calculated the amount of loss as follows: **Fazio**/Olson purchased the New Virginia property for $48,000, and then prior to closing on this sale with Homecomings, obtained a subsequent offer to purchase for $110,000 – a difference of $62,000. The court deducted a total of $3,500 for roofing repairs and the new carpet installed at the New Virginia property. The court further deducted $2,000 for a payment made to Jordan for additional repairs after he bought the property. Accordingly, the loss calculation for the wire fraud was set at $56,500. The district court then added in $1,650 for the mail fraud reimbursement count. The final loss to Homecomings was calculated at $58,150. Because the loss was between $30,000 and $70,000, **Fazio's** offense level was increased by six levels. United States Sentencing Guidelines Manual § 2B1.1(b).

Fazio argues that he spent close to $25,000 on improvements that should be deducted from the loss calculation. The district court rejected **Fazio's** assertion that he spent this much on repairs to the property, finding that the only repairs to the property supported by the record were for roof repair and new carpeting, which he calculated to be $3,500.

We agree with **Fazio** that the record supports more than $3,500 in repairs. The roof repairer testified at trial that he billed **Fazio** approximately $4,600 and was paid this amount. Olson testified that trash removal, painting, and drywall work were performed on the property before it was sold to Jordan. Jordan also indicated that when he first looked at the property, there was much trash (old cars and appliances) that needed to be removed. So, it seems clear that the district court's credit to **Fazio** of $3,500 is not supported by substantial evidence in the record. The roof repair alone was more than that, and it is undisputed that this amount was paid by **Fazio**. However, assuming arguendo that all of **Fazio's** assertions about the cost of repairs to the New Virginia house are true – $25,000 as advocated in his brief – this does not change the Guidelines calculation of between $30,000-$70,000 in loss. Subtracting $25,000 from $58,150 still leaves a loss calculation of $33,150.

Thus, in order for us to reverse on this issue, we must agree with **Fazio's** other arguments about the district court's loss calculation. In this regard, **Fazio** argues that he personally received no benefit from the New Virginia sale. We agree that the record is clear that **Fazio** in no way profited from the New Virginia transaction. He is still paying on the original $45,000 note from Polk County Bank. But that does not mean Homecomings did not suffer a loss. Generally, loss under the Guidelines is the greater of actual or intended loss, and the court need only make a reasonable estimation. ***United States v. Scott***, 448 F.3d 1040, 1044 (8th Cir.2006). **Fazio** was convicted by the jury for misrepresenting to Homecomings that Olson bought the property, when it was actually him, and for failing to disclose that he had another offer for substantially more

money before the Homecomings-Olson transaction closed. If relations between Olson and **Fazio** had not soured, he very likely would have made a significant profit on the transaction. The fact that due to his personal circumstances he did not profit from the transaction does not preclude Homecomings from suffering either an actual or intended loss.

Fazio also argues that the loss calculation fails to take into account the amount of money that the quick sale to Olson saved Homecomings, if for example, it had been required to market the property for an extended period of time. **Fazio's** arguments fail because we cannot fault the district court for failing to speculate about the amount of money that Homecomings may have saved because of the quick sale to Olson.

We grant particular deference to the district court's loss calculations because of its "unique ability to assess the evidence and estimate the loss." ***Id.***; U.S.S.G. § 2B 1.1, cmt. n. 3(C). We find that the district court has made a reasonable estimation of loss in this case, despite our conclusion that **Fazio** should have been credited with more than $3,500 in repairs to the property. All of the district court's remaining conclusions are supported by substantial evidence in the record, and the resulting estimation of loss between $30,000 and $70,000 is reasonable. Accordingly, we deny **Fazio's** arguments on this point.

Fazio next challenges the district court's application of a sentencing enhancement for an abuse of a position of trust. We review the district court's conclusion that **Fazio** occupied a position of trust for clear error. ***United States v. Erhart***, 415 F.3d 965, 972 (8th Cir.2005), *cert. denied*,

___ U.S. ___, 126 S.Ct. 1181, 163 L.Ed.2d 1138 (2006). A position of public or private trust is characterized by professional or managerial discretion, and the abuse of trust enhancement applies where the offender has abused discretionary authority entrusted to the defendant by the victim. ***Id.***

The district court applied the enhancement because of **Fazio's** position as a real estate agent retained by Homecomings, an out-of-state company relying on him to be honest and forthright with them. In ***Erhart,*** we affirmed the application of an enhancement as applied to a chiropractor who submitted inflated claims to insurance companies. ***Id.*** at 972. We rejected the ***Erhart*** defendant's argument that the insurance companies permitted him little professional discretion because they closely scrutinized his billings, noting that the fraud "continued as it did precisely *because* the insurance companies trusted Erhart and the accuracy of the claims that he supplied them." ***Id.***

Similarly, **Fazio** argues that Homecomings set many of the parameters of their business relationship, and that he therefore did not occupy a position of trust. We disagree and find that the district court did not clearly err in applying the abuse-of-trust enhancement. Like the chiropractor in ***Erhart,*** **Fazio** was responsible for representing past events truthfully to a remote reimbursing company. And, with regard to the New Virginia property, Homecomings clearly indicated that it would not sell to its listing agents. **Fazio** easily sidestepped that requirement by filling in another person's name on the offer, when he was obviously the person buying the New Virginia property. Accordingly, we agree with the district court that **Fazio** occupied and abused a position of trust.

Fazio next argues that his sentence was unreasonable. A sentencing court acts unreasonably if it fails to consider a matter of relative importance, gives undue weight to an improper or irrelevant matter, or arrives at a sentence outside of the range justified by the facts of the case. ***United States v. Medearis***, 451 F.3d 918, 920 (8th Cir.2006). **Fazio** argues that the district court gave significant weight to the following improper or irrelevant factors: acquitted conduct, his failure to admit wrongdoing, and submitting inconsistent financial statements to the probation office.

We note that the district court followed the sentencing procedure set forth in ***United States v. Haack***, 403 F.3d 997, 1002-03 (8th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 276, 163 L.Ed.2d 246 (2005), in fashioning **Fazio's** sentence. Based on many factors, including the loss calculation and the abuse-of-trust enhancement, the district court determined that the Guidelines range was eighteen to twenty-four months. The district court considered the factors set forth in 18 U.S.C. § 3553(a), and sentenced **Fazio** to twenty-four months – the high end of the Guidelines range.

Our reasonableness review is akin to the abuse of discretion standard. ***Medearis***, 451 F.3d at 920. The sentencing transcript reflects that the district court did consider all of the things that **Fazio** complains about. However, it was within its discretion to do so. Accordingly, we find that the court did not act unreasonably in refusing to sentence **Fazio** below the Guidelines range. We find no abuse of discretion in the district court's ultimate sentence of twenty-four months' imprisonment.

Finally, **Fazio** contends that the district court erred in ordering him to pay $13,115 in restitution to Homecomings. In determining whether to order restitution, the district court shall consider the amount of loss sustained by the victim, the financial resources and earning ability of the defendant, and any other factors deemed appropriate by the district court. ***United States v. Berndt***, 86 F.3d 803, 808-09 (8th Cir.1996).

The district court set the restitution amount the same as the loss amount – $58,150, but reduced that award by the amount that Olson's attorney paid to the United States Marshal's office, $45,035, and ordered **Fazio** to pay the balance, $13,115. We have previously found that in setting the loss amount at $58,150, the district court erred in not giving **Fazio** appropriate credit for repairs made to the New Virginia property. Although denial of credit was not enough to make a difference for purposes of the loss calculation under U.S.S.G. § 2B1.1, it does make a difference in the restitution. While the record is not entirely clear as to the amount **Fazio** should be credited for repairs, it is clearly more than the $3,500 applied by the district court. The amount may not equal exactly $13,115, but our review of the record indicates that Homecomings will be adequately made whole when the government remits to it the $45,035 held by the Marshal's office. Accordingly, we vacate the district court's award of restitution.

III. CONCLUSION

We affirm **Fazio's** conviction and sentence, and remand to the district court to deny the motion for new trial and vacate the award of restitution.

UNITED STATES DISTRICT COURT

SOUTHERN District of IOWA

UNITED STATES OF AMERICA

V.

Leonard R. Fazio

JUDGMENT IN A CRIMINAL CASE

(Filed Aug. 3, 2006)

Case Number: 4:04-cr-00315

USM Number: 07347-030

Alfredo Parrish
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) Two, Eight, and Nine after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:1341	Mail Fraud	08/23/02	Two
18:1343	Wire Fraud	08/20/03	Eight
18:1343	Wire Fraud	11/20/03	Nine

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) One, Three, Four, Five, Six, and Seven

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 3, 2006
Date of Imposition of Judgment

_____
Signature of Judge

Robert W. Pratt, Chief U.S. District Judge
Name and Title of Judge

August 3, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 months on Counts Two, Eight, and Nine, with all counts to run concurrently to each other.

☒ The court makes the following recommendations to the Bureau of Prisons:

that defendant be placed in a facility as near his home in Iowa as possible

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☒ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

three years on Counts Two, Eight, and Nine, with all counts to run concurrent to each other.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

You shall work only at employment approved by the U. S. Probation Office. You shall consult the U. S. Probation Office prior to any changes in employment. You shall not terminate any employment without prior approval from the U. S. Probation Office.

If not already paid, the balance of the restitution in the amount of $13,115 is ordered. You shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office. You shall provide the Probation

Office access to any financial records including income tax returns, and checking accounts. You shall not enter into any financial agreement, incur new credit charges, open additional lines of credit, or checking account, or make any purchases in excess of $500 without approval of the U. S. Probation Officer. You may be required to participate in an IRS offset program which may include the garnishment of wages, or seizure of all or part of any income tax refund to be applied toward the restitution balance. You may be required to participate in the Treasury Offset Program which would include the seizure of any government payment to be applied toward the restitution balance. In addition, you may be subject to wage garnishment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$ 40,000.00	$ 13,115.00

☐ The determination of restitution is deferred _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be after such determination.

☐ The defendant must make restitution (including community restitution)

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Homecoming Financial Attn: Greg Seale 9350 Waxie Way, Ste 100 San Diego, CA 92123	$58,150.00	$13,115.00	
TOTALS	$ 58,150.00	$ 13,115.00	

☐ Restitution amount ordered pursuant to plea _____

☒ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ the interest requirement is waived for ☐ fin ☐ restitution.
- ☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties

A ☒ Lump sum payment of $ $53,415 due immediately, balance due

☐ not later than _____ , or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be made to the Clerk's Office, U. S. District Court, P. O. Box 9344, Des Moines, IA 50306-9344.

While on supervised release, in the event all payments and costs are not already paid, you shall cooperate with the Probation Officer in developing a

monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Nothing in this judgment shall be construed as a limitation on the authority of the United States to apply to the Court for a writ of garnishment subject to the approval of the Court in accordance with the Federal Debt Collection Procedure Act, 28 U.S.C. §§3301, et seq., or applicable State law, during the time period that the defendant is incarcerated or under supervision pursuant to this judgment. (See 18 U.S.C. §3664(m)).

Nothing in this judgment shall be construed as a limitation or restriction on the authority of the Bureau of Prisons to require additional payments as a condition for an assignment or for participation in any program.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☒ The defendant shall pay the following court cost(s):

$1,500 for the appraisal of 1048 315th Ave., New Virginia, Iowa completed by Iowa Appraisal and Research Corporation.

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

$45,035.00 in proceeds from the December 9, 2003 sale of property identified as 1048 315th Ave., New Virginia, Iowa.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.